

IN THE COURT OF THE ADDITIONAL CHIEF METROPOLITAN
MAGISTRATE EGMORE : CHENNAI.

C.C.No. 4680 OF 2004

State : Assistant Commissioner of Police
Cyber Crime Cell,
Central Crime Branch,
Chennai-8

Complainant

Vs

Suhas Katti

Accused

MEMORANDUM OF WRITTEN ARGUMENTS U/S 314 CrPC
ON BEHALF OF THE ACCUSED

The accused above named begs to state as follows:

The accused above named submits the following written submissions in addition to the oral submissions already made before this Hon'ble Court.

1. The accused stands charged for offences under sections 469 , 509 IPC and Section 67 of Information Technology Act 2000. The gravamen of the charge is that this accused driven out of malice against the complainant PW1 Ms. Roselind composed obscene messages on 7-2-2004 in the name of PW1 Ms. Roselind as if it is composed by her and posted it to different Yahoo groups so that the people who access the said Yahoo sites could see it. It is the further case of the prosecution that the intention of the accused is that persons who see such message shall send response messages to PW 1 and the same did happen leading to mental agony and injury to the complainant - PW1. The accused is stated to have repeated the posting of the messages once again on 9-2-2004. Based on the said allegations, the accused was arrested on 25-2-2004 and in due course was remanded to judicial custody. The accused remains to be in custody till today.

2. Based on the final report of the complainant, charges were framed against the accused. He pleaded not guilty to the charges. On behalf of the prosecution PWs 1 to 12 were examined and Exhibits P1 to P34 were marked. On behalf of the accused Ex.D 1 certified copy of the divorce petition filed by PW1 - complainant against her ex-husband Jaichand Prajapathi before the Family Court, Chennai was filed. The accused further to his questioning under section 313 CrPC has also filed a written statement along with certified copy of the counter filed by Jaichand Prajapathi, the ex husband of PW 1 Roselind before the Family Court, Chennai. MO 1 a cell phone and MO 2 floppies (six Nos.) were also marked in court.

3. It is submitted that the prosecution has failed to establish by acceptable evidence the charges against the accused herein. In support of the above the following submissions are made.

I- MO1 ,Exhibit-28

In the final report the Investigation Officer has stated that on 25-2-2004 the accused was arrested and his mobile Phone Number 98210-31271 in which the complainant's phone numbers stored was seized. PW 10 Raman has deposed that on 28-2-2004 the accused was questioned and thereafter from the machine GSM reader which was available in the Commissioner of Police office, the SIM Card of the mobile phone of the accused was inserted in it and a print out was taken. That print out was identified by him as EX P 28(3 Sheets).

The important aspect of his evidence is that GSM Reader is a **machine**. This aspect of PW 10's evidence is fortified by his answer in cross examination wherein he states that in the machine GSM Reader, if the SIM card is inserted, then all the details or datas stored in electronic form in the SIM card will come out. He also has deposed that when he was examined by IO, and his statement u/s.161 CrPC was recorded, he did not specifically state that the details from the SIM card was taken from GSM Reader. In EX P 28 also there is nothing to suggest that it was taken from an instrument called GSM Reader.

On this aspect PW 12 Assistant Commissioner of Police who is the IO in this case has stated in chief that Super GSM Reader a software was used. In Cross examination the IO has stated that in the seizure mahazar for

the seizure of mobile phone, the SIM card was not specifically stated as seized. Further the IO has specifically stated that GSM Reader is only a software.

The above piece of evidence states how the IO has taken personal interest to see that the name -"GSM reader" is not disclosed to the accused to enable him to meet the case of the prosecution in this vital aspect. The IO has specifically avoided the name of GSM Reader throughout the final report and the annexures thereto. He has gone to the extent of stating that it is only a software to create an impression in the mind of this Hon'ble Court that it is not a device or instrument. The accused specifically submits the literature about GSM Reader in this regard. The GSM Reader is a package containing Super GSM Card Reader with USB connector cable, (which is a device or instrument), Super GSM Reader software on CD and a SIM card adapter. The IO has thus suppressed the instrument part of GSM package but has projected as if GSM is wholly a software. The IO cannot be taken to have deposed on this aspect inadvertently. The literature about GSM Reader submitted along with this written submissions, belies the efforts of the IO in this regard. The IO has suppressed this fact with a oblique motive i.e., the GSM reader package can be used to delete Phone numbers, Message etc found in the memory of SIM Card and instead can be used to pump in or store phone numbers, messages, edit them, etc. It is relevant to point out here that the mobile phone and the SIM card were in the custody of the IO from 25-2-2004 when they were first said to be seized till 28-2-2004 when the datas in the SIM card were extracted in the form of printout ie EX P 28.

It is submitted that the conduct of the IO in the above regard is contrary to **gathering** cyber evidence in the light of the development of cyber forensic principle accepted throughout the world. The said principles are submitted below under the next heading of this written submission.

II CYBER FORENSICS AND CYBER EVIDENCE

The Information Technology Act 2000 was passed pursuant to India signing the treaty **UNCITRAL** ie United Nations Commission on International Trade Law. A model law was adopted at the said commission and India being member signatory to the said convention has subsequently passed the IT Act 2000. It is submitted that the law of cyber science is not complete in all aspects in India and one has to look to the principles and laws of other countries also.

The prosecution before letting in cyber evidence ie computer related evidence has to primarily establish what is known as "Chain of Custody". It is an accepted fact that electronic evidence in the form of outputs of computers can be easily altered and hence the necessity of establishing the above chain of custody. Preserving chain of custody for electronic evidence at a **minimum**, requires proving that :

- **No information has been added or changed**
- **A complete copy was made**
- **A reliable copying process was used**
- **All media was secured.**

Proving this chain is unbroken is a **prosecutor's primary tool** in authenticating electronic evidence. The accused submits the concerned literature on this aspect as part and parcel of this written submission for the kind consideration of this Hon'ble Court.

EVIDENCE ON RECORD :-

PW 1 to PW3 has clearly admitted in evidence that on 14-2-2004 when PW 4 SI Uma Devi took them to a cyber café in Kennet Lane at Egmore, Chennai-8 a cyber expert also accompanied them. SI Umadevi however does not accept this.

PW1 states that along with her complaint she gave ExP1 to P7. In none of this exhibits the date on which the printout is said to have been taken is reflected. PW1 also states that about 10 floppies were taken on 14-2-2004 whereas SI Umadevi states about only six floppies were taken. PW2 states that he only got floppies and that the floppies were only 5 to 8 in numbers. PW1 admits that the word Par-ant which was said to have been created by her on 10-2-2004 does not find a mention in EX P 6 printouts.

It is submitted that from the evidence of PW 1 to 3 it is clear that the warning message was given from the computer system of PW1 installed at her house, the blocking of e mail ID of accused was done from the computer system of PW1 installed at her office. The Investigation Officer has not taken the necessary minimum precaution of inspecting the computer system at the residence and office of PW1 nor took any precaution to establish the chain of custody as required in computer forensics.

PW 4 SI Umadevi has taken the printouts marked as EXP 9 to P12 .All these printouts were taken on 23-3-2004 ie long after the arrest of the accused and during investigation. There is no authentic printout with the date 10-2-2004 on which date the warning message is said to have been given by PWs. There is also no authentic record in the form of printouts said to have been taken on 14-2-2004.

The accused is said to have used two cyber cafes with Internet Protocol Numbers .The first No. is 61.11.10.99 of Hello World Center run by PW 9 Deepak Patel .The other IP No.is 202.88.165.53 of Heighten Advertising run by PW 8 Lokesh Vijay Ranadeve. During investigation PW4 Umadevi deposes that on 28-2-2004 after the accused confessed and revealed the pass word, he was taken to PW7 John K.Issac's shop M/s.Link Up where she gained access using the pass word furnished by the accused and took out printouts EX P 16 to P 20 from the mail box of the accused. In EX P 20 series it is seen as if the message was received by the accused on 8-2-2004. The prosecution is not able to explain as to how the message when said to have been given on 7-2-2004 and stored by the accused on 7-2-2004 and opened again on 9-2-2004 for posting it again ,could have found a place in his message box on 8-2-2004.This leads to only one conclusion as has been maintained by the accused from the beginning ,that it was the complainant PW1 ,PW2 and 3 who have posted the message in his box and requested him to help them in posting the warning messages. It is also the reason why the message relating to par-ant were found in his mail box as per EXP 17 and P 18. Further in the first page of EX P 20 series, the title received from with IP No etc is not found whereas in the second page of the same exhibit they are found. No explanation is coming forward from the prosecution as to how the printout could have reflected as above.

AUTHENTICITY OF ELECTRONIC RECORDS :

The IT Act 2000 has made amendments to the Indian Evidence Act 1872 by inserting section 65B as to what are the prerequisites necessary for admitting computer printouts ie outputs in evidence. There has to be a certificate appended to the printout at the foot of the printout to take it as admissible evidence. The prosecution itself has placed EXP 29 the report of Vijayashankar PW 11 with the said certificate. Realizing very late the lapse which is very vital as to the authenticity of the printouts the prosecution has filed a memo to let in the certificates as EX P 31 and 33.It is submitted that

the certificates are not in terms of the wordings of Section 65B of IEA and further the IO is the person who has given this certificate belatedly and there is every chance for him to have prepared this certificates before deposing. The IO also admits that except P 29 the rest of the printouts do not bear the required certificates' at the foot of the printouts.

To establish the chain of custody of electronic records at least the IO ought to have taken the precaution of seizing the floppies MO2 series in the form of proper mahazar with a seal and signatures of the concerned persons on it. This was not done. So also for the SIM card of the mobile number there is no authenticate record to show that the SIM card was seized, was not altered while in the possession of the IO. In fact even with regard to its seizure there are varying versions. The IO has prepared the mahazar for the seizure of the mobile phone EXP8 on 25-2-2004 but the confession dated 28-2-2004 reads as under,

".....You arrested me and told the facts. I handed over the mobile phone in which I have stored the phone numbers of the Roselind....."

Further the Form 95 which is an intimation to the Court as per section 102 CrPC and Police Standing Orders also states that the cell phone was seized only on 28-2-2004.

To establish that the chain of custody has not been properly maintained leading to the alteration or manipulation of the electronic data the following evidence is crucial. **PW1 assertively states that she saw the offending mails and took out printouts. Specifically the prosecution itself has chosen to lead in chief examination that the offending mails EXP2 series printouts were taken by PW1 on 9-2-2004. Later it is the admitted version of PW1 to 3 that the warning message was posted by creation of an ID Par-ant on 10-2-2004. In fact PW1 is emphatic about the fact that par-ant was created only 10-2-2004. If it is true it is common inference that the printouts allegedly taken on 9-2-2004 EXP2 series could not have made a mention about par-ant at all since on that date that name par-ant did not exist at all. On the contrary in EX P 2 on top it is clearly mentioned as par-ant .**

The said Printout does not bear the date. PW1 to 3 admit that a computer expert accompanied them with PW4 Umadevi on 14-2-2004. Till date it is not known as to who is the expert. These tell tale pieces of evidence clearly is another pointer to the fact and contention that the electronic records in this case were cleverly manipulated to fix the accused.

It is further submitted that even leaving aside all the technical aspects of e-crime and e-evidence it is common man's knowledge that Ex P1 to P7 in the absence of date could have been easily manipulated with the help of a computer system and a printer. Once such a manipulation is stored in the system, any number of copies can be taken on any date which will accordingly reflect the same in copies. This is because the computer system can give only that which has been fed into it and stored. It is for this reason that computer forensics insist that the chain of custody should be clearly proved and further law requires as per Section 65B a certificate from a responsible person to admit such documents. In the present case PW7 John K. Issac has clearly deposed that he declined to give a certificate. However he was compelled to give a certificate and the same was marked.

BLOCKING THE E-MAIL ID OF ACCUSED :

Exhibit P5 was marked to establish that PW1 has blocked the e mail ID of accused so that she does not receive messages from him. In the same document immediately after blockage of the ID of Suhas Katti, the accused herein, the e mail ID of Jaichand Prajapathi was also shown as blocked. Why did PW1 block his message ? If as per her version that after divorce from Jaichand Prajapathi there was no contact from him why block his message ? That too after blocking the ID of accused ? The prosecution has no answer to these questions at all.

III. FIRST INFORMATION REPORT

The complaint in this case was said to have been given on 14-2-2004. After receipt of the complaint the following acts were done by the police.

- PWs 1 to 3 were taken to cyber café in Egmore, Chennai-8
- PW4 a subordinate officer of PW12 the IO accompanies PWs 1 to 3

to the cyber café in Egmore.Chennai-8.

- Printouts being electronic records were taken after browsing.
- Floppies in which datas were stored after browsing the facts relating to the case.
- PW12 the IO approaches PW 11 a specialist in cyber related matters according to prosecution on 18-2-2004 and he along with PW12 does a thorough probe and gives all necessary information.
- Requisitions dated 17-2-2004 were given to Ms.Dishnet and Hathway.

After all these steps the IO is said to have registered EX P 34 the printed FIR. and a crime No.107 of 2004 was said to have been assigned for the first time.

The FIR thus in this case is registered during the course of investigation and it cannot be said to be one registered after preliminary enquiry as is claimed by PW 12.Taking definite steps on a complaint disclosing cognizable offence is investigation as per settled law of the land. Further it is a mystery as to how in the letter dated 17-2-2004 to M/s.Dishnet the mention of crime No as 107/04 is there. No witness is ready to give a convincing answer and the prosecution has chosen not to examine the author of Exhibit P 15 one T.Vidhya knowing fully well that the suspicious nature of the case will be exposed by her examination.

The complaint in this case also doubtful since there is no mention of creation of e-mail ID par-ant no mention of posting of warning messages etc though all such actions were taken by PW1 before giving the complaint on 14-2-2004.PW1 or the prosecution cannot be allowed to say that the complaint was given in haste as there was nearly 5 to 6 days from the date on which PW1 first saw the message according to her.

IV DOUBTFUL IDENTIFICATION OF ACCUSED

The prosecution in this case apart from the highly advanced and techno savvy electronic evidence has also resorted to its usual conventional

evidence in the form of identification of the accused by the witnesses. Out of this identification the identification by PWs 8 and 9 are relevant.

PW 8 and 9 are intermediary service providers as per section 79 of the Information Technology Act 2000. It is an admitted fact that they are not incorporated companies nor partnerships. There is clear evidence of the IO in this regard apart from the other documentary evidence. As per section 79 of IT Act the intermediary is also liable for the offences committed throughout internet services provided by them unless they are able to show that they have taken reasonable precautions. In particular the section uses the word that they either should prove that the offence was committed without their knowledge or that they have taken all due diligence to prevent the commission of such offence.

It is submitted that there are no regulations framed under the IT Act 2000, governing the functions of intermediary though there are such regulations regarding the service provider as such. Hence whether the intermediary has taken due diligence is one of fact and to be judged from the standard of a reasonable man. A person running a cyber café and provides internet access has no control over the access to anyone in respect of the thousands of sites available across the world. The standard of obscenity or pornography also differs from country to country. It is submitted that for example while depiction of normal adult heterosexual acts in the form pictures is not at all an offence in western countries and such internet sites are easily accessible to anyone who opens the net. In India even depiction by pictures of such adult heterosexual acts are taboo and an offence if a person is in possession of them for exhibiting as per section 292 IPC. So also in western countries child pornography depiction though web sites is an offence and such countries have taken measures to curtail the hosting of such sites. Even then the law breakers in such countries are using measures and means to display such sites or allow access to such sites. Hence the Service Provider and Intermediary are expected to act taking into account the above factual position. A customer of a cyber café pays for it on hourly/monthly basis and gains access to the internet. Once he gains access, there is no way to stop him or her in gaining access to any offending sites which host pornography or in exchanging e mail messages which are obscene. Hence the Intermediary has to allow only customers with their full address and their entry and exit timings has to be noted in a register. This is how he can point his fingers to any wrongdoer in case of subsequent police investigations.

In this case the IO has chosen to warn PW 8 and 9 by drawing their attention to section 85 of IT Act which has nothing to do with the liability of intermediary. The said witnesses deposition also reveals that they were afraid about their lapses when police questioned them. Their evidence also points out that their registers P22 and 24 were not maintained correctly and that the IO warned/advised them to maintain them properly in future. These aspects clearly show that both have their own reason to be apprehensive as their licence is liable to be cancelled if the IO takes appropriate action. It was only under these circumstances they have pointed out their fingers at the accused. Further the accused is alleged to have visited their café only once and how they can remember the accused all along and that too after a lapse of long time ?

The IO has while resorting to conventional evidence in the form of oral evidence has failed to establish by necessary expert evidence that the signature in EXP24 which is P 25 is only that of the accused by taking specimen signatures /writings of the accused and sending it to a handwriting expert. The IO could have easily obtained the signature of Jaichand Prajapathi the ex husband of PW1 from the file of the Hon'ble Family court wherein the said person has signed and filed his counter to the divorce petition filed by PW1 . This signature could have been sent for comparison along with the signature in Ex P 24 i.e EXP25. This was not done. Further the IO has not taken any concrete steps to trace Jaichand Prajapathi to examine him. Instead the prosecution is relying upon the tutored oral evidence of apprehensive witnesses PWs 8 and 9.

V- OTHER VITAL ASPECTS

- The officials of Mumbai police force who accompanied PW 12 at Mumbai were not cited nor examined.
- The station records of the police station where accused is alleged to have been kept after his arrest on 25-2-2004 were not produced nor marked.
- PW7 Issac has already favoured IO Mr.Balu regarding the latter's daughter project preparation for which also he has not charged anything. For assisting in this case also he has not charged anything. In chief he gives an impression as if he knew IO only on 28-2-2004 for the first time but his answers in cross examination exposes him.
- PW10 Raman has attested the confession alleged to have been given by accused containing details of which PW 10 has no personal knowledge. PW10 himself accepts this fact.

- PW 10 states that the IO has approached RPG Cellular company, Nokia Company in writing to help him in extracting the details from the SIM card but IO PW12 flatly denies any such thing.
- PW11 has found out the e-mail ID ro-an on 18-2-2004 itself. IO PW12 is also trained in computer technology and how long it would have taken for him to crack the pass word ? This is all the more possible in the light of PW 12's conduct in suppressing the use of GSM reader and other aspects. Even otherwise PWs 1 to 3 categorically admit that they went to cyber café at Kennet Lane, Egmore, Chennai-8 on 14-2-2004 with SI Uma devi and a computer expert and how long it could have taken for the expert to crack the pass word ?
- Section 85B of the Indian Evidence Act clearly states that only in the case of secure electronic record, the court shall presume that such electronic record has not been **altered**. Hence in the case of other electronic records section 65B of the Indian Evidence Act insists for a certificate. The legislative wisdom itself accepts that electronic records can be altered and hence the certificate. It is unfortunate that PW11 claiming to be a specialist in computers has chosen to avoid this specific question and states that in his opinion the certificate is only a legal requirement. The definition of secure electronic system in Section 2 (ze) states as to when a software, hardware or procedure can be taken as secure system. Even this aspect is not known to the IO.
- The requisition said to have been given by IO to PW11 for his assistance has not been produced by the prosecution.
- PW 11 admits that e-mail ID can be masked, that is, altered
- The prosecution has chosen to let in a weak motive which is an imagination for fixing the accused in this case. The prosecution shows that even while studying in the year 1997 the accused has shown an obscene writing in the train to PW 1 and told her that it is the best way to embarrass a lady. The prosecution while trying to suggest this weak motive has conveniently forgotten that it is was accused who originally advised PW1 from marrying Jaichand Prajapathi (PW3 herself accepts), has stood with PW1 during her testing times of cruelty at the hands of her ex husband, that even after PW1's

divorce, accused used to come and stay with PW1 and her family and even while such staying he never misbehaved with PW1. In fact there is evidence to show that PW1 was freely accompanying accused to all places including Pondicherry.

- The IO has not mentioned either in the remand report filed before the Hon'ble 44th MM Mumbai or in the remand report filed before this Hon'ble Court as to the factum of taking accused after arrest to the cyber cafes in Mumbai. In fact the IO has first stated that he has made mention in the remand report but later has chosen to resile from the said testimony and answered that he has only noted it in his case diary.
- PW12 IO claims that the printouts taken by SI Umadevi have been sent to M/S Hathway and Dishnet for getting particulars but SI Umadevi PW4 has claimed that Exp9 to P21 are the printouts taken by her. On the other hand PW4 SI Umadevi claims that before filling charge sheet since the printouts were not clear new printouts were taken.
- PW12 IO claims that for preparation of floppies a mahazar was prepared. But no such mahazar was either filed in court nor marked.
- PW12 was questioned specifically in cross examination that when SI Umadevi went to cyber café immediately on lodging of complaint along with PW1, whether any cyber expert accompanied them. Instead of denying this fact, he only states that he does not know about it, thereby implying that such expert could have accompanied them as obstinately claimed by PWs 1 to 3.

VI- PLEA OF DEFENCE

The accused was friendly with PW 1 from the year 1997 onwards and has counselled her personally on various issues. PW1 taking wrongly the concern of the accused towards her as love, asked him to marry her. This was turned down by the accused and thereafter she fell in love with Jaichand Prajapathy and married him much against the advice of the accused and the wishes of her parents. The accused as a true friend stood with her in her difficult times and helped her when Prajapathi ill treated her. After her divorce the accused continued to be friendly with her and having recovered from the failure of her first marriage, she again proposed to the accused.

The accused again advised her not to entertain such thoughts and that he is only her friend always. Infuriated by this she has chosen to point her suspecting finger at the accused. The accused is not the originator of the offending message nor he has anything to do with the same. The prosecution has chosen to falsely implicate him at the instance of the PWs 1 to 3.

The accused is also a youngster with a promising career ahead of him. He is suffering and is in incarceration for the past eight months.

Hence it is prayed that this Hon'ble Court may be pleased to acquit him of the charges levelled against him, pass such further or other necessary orders in the circumstances of this case and thus render justice.

Dated at Chennai this the 26th day of October 2004.

COUNSEL FOR ACCUSED

Documents submitted along with the Written Submissions :-

1. Literature on cyber forensics and cyber evidence-some aspects
2. Literature on GSM Reader.